In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 436

JOSEPH DE ZON,
Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.
(a corporation),
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF ISSUES.

The Circuit Court of Appeals held that the case was properly disposed of by a directed verdict for respondent steamship company for two reasons:

(a) It was established that due care and diligence were exercised by the steamship company to employ and retain in its employ a competent physician, and if there was any negligence either in diagnosis, treatment, or hospitalization, it was that of the physician, and under the circumstances

the steamship company could not be held liable; and

(b) Even if, in some way or other, the conduct of the doctor could be said to be attributable to the steamship company, there was no substantial or competent evidence to establish that the doctor had been negligent, and no case was made out for the jury,—and if a verdict based upon the negligence of the ship's doctor had been returned, the court would have been obliged to set it aside.

Petitioner omits and avoids discussion or argument on the first proposition, and his presentation is directed to the proposition that there was some evidence from which the jury might have been warranted in findin. that the ship's doctor was chargeable with some negligence in respect of diagnosis, treatment, or hospitalization. Petitioner also makes the suggestion, entirely unsupported by the record, of some negligence of a second engineer on the vessel. Each of these propositions will be separately considered.

I.

THE CARRIER FURNISHED THE CREW WITH A COMPETENT PHYSICIAN AND SURGEON SELECTED WITH REASONABLE CARE, AND UNDER THOSE CIRCUMSTANCES IS NOT LIABLE FOR ANY MISTAKE OF THE DOCTOR, EITHER AS TO DIAGNOSIS, TREATMENT OR HOSPITALIZATION.

The undisputed evidence shows that defendant employs a chief surgeon, Dr. Rodney A. Yoell (R. p. 124, lines 9-10). One of his duties is to select and appoint

the medical personnel on ships, including ships' surgeons (R. p. 124, lines 13-14). The ship surgeon on this voyage was Dr. Will Lewis (R. p. 97, lines 6-10). Before he was employed, his qualifications were fully inquired into and favorably passed upon (R. pp. 124-126). Records were investigated, a personal interview was held, and recommendations obtained (R. pp. 124-126). It was established and not disputed that Dr. Lewis had attended Cooper Medical College, graduated from the Medical Department of the University of Southern California in 1907, interned after graduation at Cedars Hospital in Los Angeles, been licensed to practice in California, engaged in private practice in Santa Barbara, California, for five years, thereafter practiced in Ventura, California, until World War I, was in war service for two years, did special surgical work in Ventura until 1929, and did clinical work in Los Angeles until becoming ship's surgeon in April, 1940; while not a specialist in the eye he had the knowledge of the eye of a general practitioner (R. pp. 96, 107, 125). Further, it was stipulated at the trial that due care had been observed by the company in making the selection (R. pp. 126-129).

The Circuit Court of Appeals summarized the facts as follows:

> "Dr. Rodney Yoell, chief surgeon for defendant, testified that he interviewed Dr. Lewis before he was engaged by defendant; that he was satisfied with the results of the interview; that he learned that Dr. Lewis graduated from a recognized medical school; that he checked the official

list of doctors licensed to practice in California and ascertained that he held an active license to practice in that state; and that as a result of inquiries concerning Dr. Lewis's reputation, he determined that he was a man of good character. There is no allegation that defendant was negligent in making its selection, nor is there any evidence showing negligence in that respect. Further, no showing has been made that subsequent to taking Dr. Lewis into its employ, defendant became chargeable with knowledge that he was incompetent, if such were the fact. Therefore, it must be taken as established that due care and diligence were exercised by defendant to employ and retain in its service a competent physician."

The full measure of the company's legal obligation to furnish proper medical care was to use reasonable care to select a reasonably competent doctor, and it fully discharged this obligation. The proposition that a steamship company has the legal duty to furnish proper medical care to sick or injured seamen is not disputed. *However, when, as here, a doctor is carried and made available aboard the ship, the steamship company discharged its full measure of legal duty to furnish proper medical care, provided it used reasonable care to select a reasonably competent doctor of good standing.* If the company was not careless in making its selection, it is not liable in the event of negligence or malpractice of the doctor. The company is responsible only for its own negligence, not for that of the doctor so chosen.

The Great Northern (CCA, 9th) 251 Fed. 826 ("We think it clear that appellees had discharged their full duty when they employed the physician,

after taking pains, as they did, to inquire of his antecedents and fitness,"):

The Korea Maru (CCA, 9th, 1918), 254 Fed. 397 ("It is not charged in either of the libels or the amendments that the claimant was negligent in the selection of, or in the employment of, the physician and surgeon, or that his incompetency or lack of skill, as charged, was subsequently ascertained by the claimant, and that with such knowledge he was retained as an employee of the vessel. In the absence of such a charge, and competent evidence to sustain it, we pass over the evidence relating to the lack of skill and competency on the part of the physician and surgeon in the treatment of Omito Stogazu");

Bonam v. Southern Menhaden Corp., 284 Fed. 360 (holding complaint of injured seaman alleging negligence of doctor furnished by defendant employer is subject to demurrer unless it includes "allegations bringing home to the defendant knowledge that the surgeon was unskilled");

Johnson v. American Mail Line, 1937 AMC 1267 (holding complaint of seamen against shipowner for injuries resulting from negligence or malpractice of surgeon employed by shipowner did not state cause of action when it appeared shipowner used reasonable care and diligence in selection of competent surgeon to act as medical officer on vessel);

The Napolitan Prince, 134 Fed. 159 ("It is not necessary to decide * * * whether the physician was guilty of negligence. Even so, his errors, mistakes, or negligence are not imputable to the ship. It is not shown that the ship was negligent in selecting him");

Geistlinger v. International Mercantile Marine, 295 Fed. 176 (holding injured seaman not entitled to recover for failure of unlicensed ship doctor to send him to hospital as requested, since "This would be error of judgment on his part for which the shipowner would not be liable");

The Sarnia, 147 Fed. 106 (holding injured seaman not entitled to judgment where competent doctors consulted and, because of error in diagnosis, he was not given shore hospitalization and insufficient treatment aboard ship was prescribed);

Branch v. Compagnie Generale Transatlantique, 11 Fed. Supp. 832 ("It seems to be well settled that a shipowner does his whole duty if he employs a qualified and competent surgeon and medical practitioner, and supplies him with all necessary and proper instruments, medicines, and medical comforts, and has him in readiness for such passengers as choose to employ him");

The C. S. Holmes, D.C., 209 Fed. 397, 399 (The master is not negligent when he exercises reasonable care in selecting and employs a regularly licensed physician, believing him to be competent, and intrusts the injured seaman to his care, in the belief that such physician will render careful and competent treatment);

Leone v. Booth S.S. Co., 178 N.Y.S. 620 (holding instruction correct that "no liability can be predicated here for anything which the doctor did in his failure to properly diagnose or treat that case" since "if the ship's doctor was competent, and the appliances and facilities in the ship's hospital were sufficient, the defendant was not liable");

Laubheim v. DeK. N.S. Co., 107 N.Y. 228, 13 N.E. 781, 1 Am. St. Rep. 815 (holding if ship's surgeon erred in treatment it did not prove incompetence or that it was negligent to appoint him, and stating "If, by law or by choice, the defendant was bound to provide a surgeon for its ships, its duty to the passengers was to select a reasonably competent man for that office, and it is liable only for neglect of that duty. * * * It is responsible solely for its own negligence, and not that of the surgeon employed");

McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529 (holding a corporation established for the maintenance of a public charitable hospital which exercised due care in selection of its agents not liable to injury to patient caused by their negligence);

56 *C. J.* 1070, Sec. 594 ("The employer is under a duty to use reasonable care and diligence in providing a physician or surgeon competent to treat the disability incurred. But where not derelict in its duty of care and diligence in the selection of a physician or surgeon, the employer is not responsible for damages resulting from his incompetence, negligence, nor error in professional judgment, such as a mistake in diagnosis.").

Petitioner complains because after the ship's chief surgeon ascertained that the ship doctor had been licensed to practice medicine in California in 1908 and that he continued to practice up to the time of his employment by the carrier, he did not check to find whether this license was renewed in 1939 and 1940. In the absence of any evidence that he was not licensed

during those years, we deem this contention unworthy of serious consideration. In fact, whether he was licensed in California is in itself immaterial.

Geistlinger v. International Mercantile Marine, 295 Fed. 176.

However, having been licensed in California, this raised a presumption of competency.

State Board of Medical Examiners v. Taylor, 129 S.W. 600.

Petitioner also complains because the ship surgeon was not a specialist in eye diseases. Of course, a ship's doctor cannot be a specialist in the many branches of medicine and it is neither expected nor required that he should be. However, the evidence shows that in this case the ship's doctor had the knowledge of the eye that a general practitioner generally has (R. p. 96, lines 107, 125), and had treated similar conditions of the eye; the matter of paint, or rust, or a chip in the eye being a common occurrence aboard ship (R. p. 103, lines 26-30). Clearly the doctor had sufficient knowledge to enable him to exercise judgment in determining whether he could treat a particular eye condition or whether he should send the patient ashore for special treatment.

Petitioner also argues that the ship surgeon was incompetent in fact. In the first place, this is immaterial because the question is whether reasonable care was used in his selection. However, the only evidence that he relies upon is, first, that the doctor did not follow the recommendation of Dr. Yap at Honolulu that the patient should be hospitalized ashore. This

was no evidence of incompetency because Dr. Yap also diagnosed the case as acute conjunctivitis, just as did the ship surgeon, and it is not claimed by anyone in the record that such an ailment could not be adequately treated on shipboard. Further, there seldom is a medical case where different doctors do not have different views or opinions, and it obviously is no test or proof of a doctor's incompetency that some other doctor might have had a different opinion regarding treatment or hospitalization. The second contention in support of alleged incompetency is that the doctor had no recollection of issuing a master's certificate at Honolulu and had no record of it. Even if we assume he did issue such a certificate and did forget it and did forget to make a record of it, that would be no evidence of incompetency as a physician. Both the trial judge and the judges of the court of appeals properly deemed such matters as this too trifling to constitute substantial evidence upon which a verdict of incompetency could be based.

II.

NO NEGLIGENCE OR MALPRACTICE ON THE PART OF THE SHIP'S DOCTOR WAS ESTABLISHED.

The fact that reasonable care was used by the company in selecting Dr. Lewis as medical officer aboard the President Taft having been conclusively determined by the evidence and the stipulation of plaintiff, and this being the full measure of the company's legal duty to furnish proper medical care, the jury could not have been warranted in reaching a conclu-

sion that the company had failed to furnish proper medical care. However, even if the company were responsible for the negligence or malpractice of the doctor (which we do not concede), no proof was made which would have warranted the jury in concluding the doctor was guilty in that regard. The facts regarding the action of the doctor with regard to diagnosis, treatment, and hospitalization are as follows:

About ten o'clock on the morning of June 4, 1940, plaintiff, while employed as a marine fireman on the S.S. President Taft, one of defendant's vessels which was on a return voyage from the Orient, while chipping and painting in the boiler room had a sudden pain in his eye and thought he got a chip or some paint in his eye (R. pp. 12-14; p. 15, lines 29-30). The ship carried a doctor and maintained a hospital and an orderly who acted as nurse and defendant knew these facts and knew that the doctor was available for treatment (R. p. 78, lines 22-30; p. 79, lines 3-7). However, he did not consider the matter serious (R. p. 18, lines 1-2) and instead of reporting to the doctor he went to his quarters where he kept an eye cup and eye wash and washed out his eye and had all the paint cleaned up (R. p. 16, lines 20-27; p. 73, lines 18-30). The next morning after he got up his eye was hurting him and he thought the best thing to do now was to go to the ship's doctor, which he did (R. p. 17, lines 16-20). Plaintiff told the doctor only that he had got a chip or some paint in his eye the day before and his eye was bothering him (R. p. 19, lines 1-5; p. 79, lines 7-14). The doctor made an examination of the eye (R. p. 99, line 1), found it red and

inflamed as is the normal condition resulting from irritation by a foreign body (R. p. 99 lines 1-13; p. 142, lines 24-30; p. 143, lines 1-17), diagnosed the condition as acute conjunctivitis (R. p. 116, lines 20-25), which is merely an inflammation of the conjunctiva or outer coat of the eye and under ordinary conditions clears up in two to four days (R. p. 104, lines 10-15), appropriately treated the eye for such condition (R. p. 17, lines 23-28; p. 18, lines 15-24; p. 99, lines 4-9; p. 103, lines 7-10; p. 104, lines 10-15; p. 139, lines 14-25), and relieved plaintiff from duty (R. p. 17, lines 23-28; p. 18, line 24; p. 19, line 5). That afternoon the ship arrived and docked in Honolulu and plaintiff was given a certificate to the Marine Hospital (R. p. 19, lines 12-26; p. 81, lines 2-7). When plaintiff arrived at the Marine Hospital about five o'clock in the afternoon it was closed so he went to the Queen's Hospital in Honolulu (R. p. 20, lines 1-11; p. 81, lines 7-10) where he saw a doctor named Dr. Yap whom plaintiff alleges to be a "competent physician" (R. p. 2, line 7). This physician made a thorough examination (R. p. 20, lines 12-16; p. 81, lines 12-24) and also diagnosed the condition as acute conjunctivitis (R. p. 59, line 10). Plaintiff returned to his ship where he was hospitalized in the ship's hospital (R. p. 20, lines 27-30; p. 84, lines 25-30; p. 85, lines 1-7). About 11:30 that same night about a half hour before the ship sailed from Honolulu, plaintiff again saw the ship's doctor (R. p. 82, lines 7-9; p. 21, lines 5-7, 19-21). Plaintiff claims that he then told the ship's doctor that he had seen a physician at the Queen's Hospital and such physician had

advised shore hospitalization. The ship's doctor had no recollection of plaintiff stating that the Honolulu physician had advised shore hospitalization and does not believe plaintiff so stated to him (R. p. 111, lines 18-21). In any event, plaintiff was given hospitalization as follows: for the five remaining days of the voyage (R. p. 87, lines 9-10) in the ship's hospital and surgery, and upon arrival in San Francisco in the United States Marine Hospital at that port. During the five-day period of his hospitalization in the ship's hospital he was served all of his meals in bed (R. p. 86, lines 1-4), was visited and treated by the ship's doctor several times a day (R. p. 103, lines 11-13; p. 60, line 30; p. 86, lines 12-13), was given almost constant attention by the ship's male nurse (R. p. 86, lines 25-30), and was given the treatment deemed appropriate by the ship's doctor (R. p. 17, lines 23-28; p. 18, lines 15-24; p. 99, lines 4-9), the physician at Honolulu (R. p. 59, lines 11-14), and an army surgeon with extensive experience in the Orient with eye infections, who was aboard ship and was called into consultation by the ship's doctor (R. pp. 104-105). Plaintiff's condition did not improve and after arrival in San Francisco he was hospitalized in the Marine Hospital (R. p. 50, lines 9-12; p. 87, lines 20-30; p. 88, lines 1-12) and after extensive examinations it developed that he was not suffering from acute conjunctivitis but from intraocular hemorrhage (R. p. 25, lines 6-11; p. 41, lines 9-10). An operation was later performed at the Marine Hospital and plaintiff lost the sight of his eye (R. p. 40, line 26).

A. The diagnosis.

When plaintiff reported to the doctor he stated that he had got a chip or some paint in his eye the day before (R. p. 19, lines 2-3). His eye was red and inflamed as is the normal condition resulting from irritation by a foreign body (R. p. 99, lines 1-13; p. 142, lines 24-30; p. 143, lines 1-17). He withheld from the ship's doctor the information he subsequently gave to the doctors at the Marine Hospital in San Francisco regarding previous eye trouble (R. p. 79, lines 9-17; p. 43, lines 22-24; p. 45, line 18; p. 65, lines 9-12; p. 68, lines 18-28; p. 71, line 21). Actually the trouble had been a matter of years (R. p. 48, lines 10-25.) The ship's doctor made the usual examination where a foreign body is complained of in the eye (R. p. 109, lines 4-5), and it did not appear unusual or dangerous but was the ordinary eye condition that he met from similar accidents (R. p. 122, lines 22-27). The symptoms from a paint chip getting in the eye are identical with those experienced by plaintiff (R. p. 142, lines 24-30; p. 143, lines 1-17). The ship's doctor had treated similar conditions of the eye; the matter of getting paint, or rust, or a chip in the eye being a common accident aboard ship (R. p. 103, lines 26-30). Without any history of a blow there was no reason to suspect an eye hemorrhage (R. p. 116, lines 20-30). An eye hemorrhage is a serious disease (R. p. 112, lines 5-6) and for a blow to cause a hemorrhage it would have to have some weight behind it; not a mere chip of paint (R. p. 123, lines 1-10). There was no history of any blow sufficient to cause a hemorrhage and he did not consider that paint would cause such

a hemorrhage (R. p. 116, line 23). In diagnosing an injury considerable weight is given to the history (R. p. 54). A medical man not a specialist in eye disorders could very well mistake a hemorrhage for acute conjunctivitis (R. p. 149, lines 7-10), and even a specialist would not be of the opinion that a hemorrhage would be caused by paint getting in the eye (R. p. 139, lines 4-9). Symptoms of conjunctivitis might be present even where there was a hemorrhage (R. p. 56, lines 18-19). The ship's doctor's diagnosis of acute conjunctivitis was confirmed by Dr. Yap, whom plaintiff alleges in his complaint to be a "competent physician" (R. p. 2, line 8), after extensive examination in the Queen's Hospital at Honolulu (R. p. 59, lines 6-14; p. 81, lines 17-23). An army doctor aboard ship, who had had extensive experience in the Orient in eye diseases, and who was called into consultation by the ship's doctor, made an examination of plaintiff after he left Honolulu and had no suggestion for treatment other than that being given for acute conjunctivitis (R. pp. 104-105). Dr. Jerome Bettman, an eye specialist, testified that paint would not cause an intraocular hemorrhage (R. p. 139, lines 1-9). After arrival in San Francisco and after an extensive series of examinations at the Marine Hospital the trouble was first diagnosed as an intraocular hemorrhage traumatic in origin (R. p. 25, lines 6-11). However, when no foreign body was found and the patient divulged that he had had an old optic neuritis trouble (R. p. 43, lines 22-24), had had a non-traumatic tumor removed from the eye (R. p. 45, line 18), had had a muscle operation on the eye in

1937 (R. p. 65, lines 9-12), had had a cyst removed (R. p. 68, lines 18-28), and had been in the hospital for gonococcus in 1940 (R. p. 71, line 21), they changed the diagnosis as being a hemorrhage of unknown origin (R. p. 41, lines 9-10). Even after the examination and treatment at the Marine Hospital in San Francisco, and the full records and history of the patient became available, it could not be stated how long his eye had been in a serious condition prior to his admission to that hospital (R. p. 47, lines 7-14).

The most that can be said is that the ship's doctor, like the doctor in Honolulu, and the doctors at the Marine Hospital in San Francisco in the first instance, made a mistake in diagnosis.

No doctor is infallible; probably no doctor has ever been correct in every diagnosis made or treatment given; neither is he omniscient. A doctor is required only to have the usual training and skill ordinarily possessed by a practitioner of good standing in similar practice, and he is responsible only where it is established by expert testimony that he did not act as a reasonably skillful and experienced practitioner in similar practice would have acted in similar circumstances. Where he possesses and uses such skill and care, he is not responsible for mistakes or for errors in judgment; and he is not to be held liable on the ground that he did not act as a specialist would have done in the circumstances.

Engelking v. Carlson, 13 Cal. (2d) 216, 88 P. (2d) 695;

Callahan v. Hahnemann Hospital, 1 Cal. (2d) 447, 35 P. (2d) 536;

Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654;

Perkins v. Trueblood, 180 Cal. 437, 181 P. 642;

Neudeck v. Vestal, 117 Cal. App. 266, 3 P. (2d) 595;

Houghton v. Dickson, 29 Cal. App. 321, 155 P. 128;

Scott v. McPheeters, 33 Cal. App. (2d) 629, 92 P. (2d) 678, 93 P. (2d) 562.

A physician is not held to a higher degree of responsibility in making a diagnosis than in prescribing treatment.

Patterson v. Marcus, 203 Cal. 550, 265 P. 222;

Donahoo v. Lovas, 105 Cal. App. 705, 712, 288 P. 698;

Brewer v. Ring, 177 N. C. 476, 99 S. E. 358, 364.

Mere proof that a diagnosis was wrong or mere failure to diagnose correctly will not support a verdict.

Adams v. Boyce, 37 Cal. App. (2d) 541, 549-550, 99 P. (2d) 1044;

Rising v. Veatch, 117 Cal. App. 404, 3 P. (2d) 1023;

Beni v. Abrons, 130 Cal. App. 206, 19 P. (2d) 523;

Donahoo v. Lovas, 105 Cal. App. 705, 712, 288 P. 698;

Patterson v. Marcus, 203 Cal. 550, 265 P. 222;

Nicholas v. Jacobson, 113 Cal. App. 382, 298 P. 505.

In any event, an error in diagnosis made by the doctor cannot fasten liability upon the shipowner.

> "If the doctors made some errors of diagnosis, *as most competent physicians and surgeons sometimes do,* and thus prescribe a treatment not sufficient to insure safe return to the United States, the fault should not be charged to those who faithfully administered that treatment."*
>
> *The Sarnia* (C. C. A. (2d), 1906), 147 Fed. 106, 108.

B. The treatment.

Plaintiff was hospitalized aboard the ship (R. p. 20, lines 27-30; p. 84, lines 25-30; p. 85, lines 1-7) and was visited and treated several times a day by the ship's doctor (R. p. 103, lines 11-13; p. 60, line 30; p. 86, lines 12-13), and was given practically constant care by the ship's male nurse (R. p. 59, lines 11-14). The treatment given him included boric wash, yellow oxide, and eye pad (R. p. 60, lines 16-17; p. 86, lines 5-21; p. 87, line 24; p. 103, lines 8-17). This was the same treatment as that recommended by the physician who examined him in Honolulu (R. p. 59, lines 11-15), and whom plaintiff alleges was a competent physician (R. p. 2, line 8), and the army doctor aboard ship with extensive experience in eye diseases, after examination and consultation, had no other suggestion (R. pp. 104-105). The treatment given him was the appropriate treatment for acute conjunctivitis (R. p. 139, lines 14-25), and was one which had successfully

*Italics here and throughout this brief have been added unless otherwise noted.

been used many times by the ship's doctor in the treatment of similar ailments (R. p. 105, lines 25-27). If the condition had been diagnosed as intraocular hemorrhage the proper treatment would have consisted merely of dilating the pupil with a mydriatic, such as atropin, and bed rest, and since the patient had bed rest the only other treatment that could have been given would have been to use such dilating medicine, the only effect of which would be merely to alleviate some of the patient's pain (R. p. 139, lines 26-30; p. 140, lines 1-22).

The most that can be said concerning the treatment given is that, in view of information later developed, some other treatment might have been used. However, nothing whatever appears to warrant any charge of malpractice or neglect (see authorities cited and reviewed, supra, pp. 15-16).

If there was an error in treatment it was merely an error of judgment on the part of the doctor, for which neither the doctor nor the shipowner is liable.

In *The Great Northern* (C. C. A. 9th, 1918), the court, in its opinion holding a steamship owner not liable for alleged improper treatment by the ship's doctor, said:

> "If there was error in treatment, it was a mistake in judgment, and it does not prove incompetency."

In *The Van Der Duyn* (C. C. A. 2d, 1919), 261 Fed. 887, the court in reversing a judgment awarding damages to an injured seaman, said:

"The ship will not be held responsible for an error of judgment on the part of the officers, if their judgment is conscientiously exercised with reference to conditions existing at the time * * *. We do not think that error of judgment of the officers of the ship, *or the surgeon who was employed*, and the lapse of time before the respondent received competent medical aid, are sufficient upon which to base liability."

C. Hospitalization.

Plaintiff was given hospitalization in the ship's hospital and surgery the same day he first reported to the ship's doctor (R. p. 20, lines 27-30; p. 84, lines 25-27; p. 85, lines 1-7). He continued to receive such hospitalization, with constant care and attention by the ship's doctor and male nurse, until the ship arrived in San Francisco five days later (R. p. 86; p. 87, lines 9-10; p. 103, lines 11-13; p. 60, line 30). Upon arrival in San Francisco plaintiff was given hospitalization in the Marine Hospital which is under the charge of the United States Public Health Service (R. p. 50, lines 9-12; p. 87, lines 20-30; p. 88, lines 1-12).

Plaintiff now claims he should have been sent from the ship while it was in Honolulu, and some hospitalization should have been arranged for him at that place.

The ship arrived in Honolulu the same day plaintiff first reported to the ship's doctor. It remained there only a few hours, and sailed at midnight for San Francisco. Although the patient's condition did

not then appear serious, the ship's doctor while in Honolulu gave careful consideration of the matter of plaintiff's hospitalization. After weighing all factors and again examining the plaintiff (R. p. 21, lines 8-9), the doctor decided that the more advisable course would be to continue plaintiff's hospitalization aboard ship and, if his condition warranted on his arrival in San Francisco five days later, to have him hospitalized in the Marine Hospital in that city.

In arriving at his opinion the many factors given consideration by the ship's doctor included the then apparently minor character of plaintiff's injury, the diagnosis of acute conjunctivitis, the hospital facilities available aboard ship, the continuous availability of himself and the male nurse aboard ship, the fact that the ship was only five days from San Francisco (R. p. 87, lines 9-10), the fact that the patient desired and preferred to continue with the ship to San Francisco (R. pp. 82-84, 93-94; p. 29, lines 18-19).

Hospitalization, or the lack of hospitalization, or the nature and character of hospitalization, is merely one phase or angle of the broader matter of treatment, and it is subject to the same rule and is controlled by the same established principle (see cases cited and reviewed, supra, pp. 15-16). No legal responsibility attaches to the vessel because of a mere mistake in judgment of the ship's surgeon respecting the hospitalization given or that should be given.

In *Geistlinger v. International Mercantile Marine*, 295 F. 176, the court, in holding that a seaman who alleged he was not given proper hospitalization was

not entitled to recover damages from a steamship company, said:

> "The libelant, who impressed me as an honest man, testified very vaguely about a request to the ship's doctor to be sent to a hospital in Southampton, which the doctor does not recall. The charge made against the ship's surgeon is that, there being a possibility of a fracture of the nose, which could not be detected at the time, he should have sent libelant to a hospital at Southampton for expert treatment. *I think this would be an error of judgment on his part for which the shipowner would not be liable.*"

It has been noted that plaintiff expressed the desire and preference that he continue with the ship until its arrival in San Francisco five days later. In a case where the seaman had expressed his desire to return to the United States, although there was no doctor or hospital aboard ship and the voyage back was a long one, the court said:

> "As to leaving him in the hospital at Port Limon, the District Judge says that it is immaterial whether or not the libelant wished to be left there. But this was not a mere matter of preference. It was a choice of evils. When a man injured, even as Greco was, protests against being left unacclimated in midsummer in a yellow-fever port, it is a very serious responsibility to assume to overrule his protest and expose him to what he may reasonably assume to be a deadly peril. Had he been left there and his hand healed quickly, but with the result of bringing him down with an attack of yellow fever, it might well be contended that the master was inhuman in not

heeding his protest and bringing him back to the port of shipment, especially since the doctor gave assurance that the voyage might be made without risk to the hand. We are not inclined to hold the ship liable, because the master, relying on that assurance, acceded to libelant's expressed wish."

The Sarnia (C.C.A. 2d, 1906), 147 Fed. 106, 108-109.

In any event, the seaman was furnished with the hospitalization that the doctor deemed best under the circumstances, and even if the doctor had been wrong in his opinion in this regard, and even if the doctor should properly have directed other hospitalization than that furnished, the shipowner has no liability:

"The ship's officers might fairly be entitled to conform their conduct touching any medical or surgical question to the instructions of men (doctors) thus qualified to decide it."

The Sarnia (C.C.A. 2d, 1906), 147 Fed. 106, 108.

III.

BECAUSE OF THE ABSENCE OF EXPERT TESTIMONY ESTABLISHING NEGLIGENCE, THERE WAS NO COMPETENT EVIDENCE WHATEVER ON WHICH THE JURY COULD HAVE BASED A VERDICT FOR PETITIONER.

If the matter had gone to the jury, the jury would have been met at the outset with the presumption that the doctor exercised ordinary care and skill required of him in diagnosing the case and treating the patient.

Engelking v. Carlson, 13 Cal. (2d) 216, 221, 88 P. (2d) 695;

Donahoo v. Lovas, 105 Cal. App. 705, 288 P. 698;

Foreman v. Hunter Lumber Co., 36 Cal. App. 763, 765, 173 P. 408.

This presumption could not be overcome by mere proof of mistaken judgment. Nor could it be overcome by any inferences or conclusions the jury itself might assume to reach from the facts and the circumstances relating to the matters of diagnosis, treatment, and hospitalization. These are questions *solely* for experts and can be established *solely* by the testimony of experts. In the absence of expert testimony establishing the fact that the doctor negligently failed to give proper treatment under the circumstances, or that he negligently failed to advise proper hospitalization, there was no competent evidence whatever on which the jury could act.

In *Ewing v. Goode* (C.C.), 78 F. 442, Judge Taft, when Circuit Judge, stated:

> "But when a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must be dependant on expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, *there is no evidence of it proper to be submitted to the jury.*"
>
> * * * * * * *
>
> "I would deem it my duty without hesitation to set aside a verdict for the plaintiff in this case as often as it could be rendered, and, that being

true, it becomes my duty to direct a verdict for the defendant."

See also:

Moore v. Tremelling, C.C.A. 9th, 75 F. (2d) 821;

Wilson v. Borden, 61 App. D. C. 327, 62 F. (2d) 866;

Engelking v. Carlson, 13 Cal. (2d) 216, 222, 88 P. (2d) 695;

Patterson v. Marcus, 203 Cal. 550, 265 P. 222;

Taylor v. Fishbaugh, 26 Cal. App. (2d) 300, 79 P. (2d) 174;

Adams v. Boyce, 37 Cal. App. (2d) 541, 99 P. (2d) 1044;

McNamara v. Emmons, 36 Cal. App. (2d) 199, 97 P. (2d) 503;

Roberts v. Parker, 121 Cal. App. 264, 8 P. (2d) 908;

Adkins v. Ropp, 14 N.E. (2d) 727;

Ramberg v. Morgan, 218 N.W. 492;

Lippold v. Kidd, 269 Pac. 210;

Barker v. Heany, 82 S.W. (2d) 417.

No expert in this case undertook to testify as to what standard medical care was required of Dr. Lewis under the circumstances that were actually presented to him as the ship was about to sail from Honolulu on June 4th. The only opinions given in the case were based on conditions which developed and were observed at the Marine Hospital on and after June 10th. There is certainly no opinion given that both the ship doctor and the Honolulu doctor should have

diagnosed the case as intraocular hemorrhage instead of conjunctivitis. The mere testimony that different treatment than that given might have been better in view of the ultimate finding of hemorrhage, in no way establishes that either the ship doctor or the Honolulu doctor was guilty of any negligence or in any way violated standard practice in reaching the diagnosis of acute conjunctivitis or in appropriately treating plaintiff therefor.

In fact, no one has even testified as to what the standard treatment was for hemorrhage. Dr. Faed testified that the treatment given at the Marine Hospital should have been given earlier, but how much earlier he did not say, and Dr. Bettman testified that it was dangerous to use that method at the early stages of the ailment. Neither of them attempted to say that the views of either constituted a recognized standard view of the subject. Every difference of medical view does not constitute standard practice, and it is only where it can be said that a doctor has violated standard practice recognized by the profession in a particular place, that he can be said to be guilty of malpractice or negligence.

All of the medical testimony is to the effect that shore hospitalization was unnecessary if the man was suffering merely from acute conjunctivitis. It is the uncontradicted medical testimony that the symptoms of conjunctivitis are often present in case of hemorrhage and that the two diseases might readily be mistaken, particularly by a general practitioner with the equipment that he would generally carry. No one

has testified that such a diagnosis of acute conjunctivitis arrived at under such circumstances constituted malpractice, as that term has many times been defined by the courts.

Of course, the testimony of the doctor at the Marine Hospital at San Francisco, based upon the diagnosis made at that hospital, that hospitalization and the treatment customarily used for hemorrhage might have been beneficial, cannot be of any weight in determining whether the decision of the ship's surgeon to continue the treatment for conjunctivitis, which was his diagnosis, was or was not proper.

IV.

NO PROOF WAS MADE TO ESTABLISH THAT PLAINTIFF'S CONDITION WOULD HAVE BEEN DIFFERENT IF HE HAD BEEN GIVEN DIFFERENT TREATMENT, AND, THEREFORE, NO DAMAGE WAS SHOWN.

Obviously, plaintiff could not make out a case for damages without affirmatively proving that his condition was caused by defendant's improper acts. If his condition would have been the same irrespective of the treatment given and hospitalization furnished, then, of course, he suffered no damages and there could be no basis for an award of damages. The plaintiff had the burden of affirmatively proving through experts that different treatment and different hospitalization would have caused different results. No such proof was made.

Dr. Faed of the San Francisco Marine Hospital, in response to questions of plaintiff's counsel, testified that he was "unable to give any opinion" as to whether any different result would have been obtained if plaintiff had been given the treatment afforded at the Marine Hospital at an earlier date, and, in response to questions by the court, he testified that he didn't "wish to go on record either way" on the question of the possible effect of hospitalization in Honolulu (R. pp. 49-53):

"Mr. Resner. Q. Tell me this, Doctor, could any treatment have been afforded, according to your examination—would earlier treatment than that which was afforded in the Marine Hospital in San Francisco have helped Mr. DeZon?

A. Possibly.

The Court. Q. What is the answer?

A. Possibly.

Q. Is it your opinion that treatment along the line that was first given, when Mr. DeZon entered the Marine Hospital should have been had by Mr. DeZon at an earlier date?

A. *I could not answer that.*

Q. Well, then, you do feel, however, that this treatment that the Marine Hospital in San Francisco gave on June 10th and following should have been given on June 4th and following is that correct?

A. I should judge so.

Q. If such treatment as was given in the Marine Hospital on June 10th and following had been afforded Mr. DeZon on June 3rd, 4th and following, can you give me your opinion as to whether that might have saved his eye?

A. *That is too difficult for me to answer.*

Q. Is it possible for you to give me the best opinion you can, and you can explain it if you like, Doctor.

A. *I am unable to give an opinion about that.*

Q. From your observation of Mr. DeZon in the hospital, and your history of the case, and the diagnosis as made and your observations, and all the facts and circumstances surrounding this case, can you give me your opinion as to whether Mr. DeZon should have been hospitalized on June 3rd and 4th, when this trouble to the eye first occurred?

Mr. Treadwell. We object to that, your Honor, on the ground that it embodies numerous things, that there is no foundation of fact—for instance, what his condition actually was at that time, what it appeared to be, and what the physician saw and what the physician knew, what kind of a hospital the physician had on the boat, and all those things are conclusions, without any supporting basis.

Mr. Resner. I think it is a proper question.

The Court. I will allow the question.

Mr. Resner. Q. You may answer the question. Do you want the reporter to read it?

Witness. Please.

The Court. Read the question, Mr. Reporter.

(Question read.)

A. I believe he should have been hospitalized; it might have helped some.

The Court. Now, then, you say 'might'. Would that mean that you have a doubt as to whether it would?

A. *I have a doubt, yes.*

Q. *In other words, it might not?*

A. *Yes.*

Q. *You don't wish to go on record either way? That is correct, is it?*

A. *That is correct.*

Mr. Resner. Q. Let me ask you this question, Doctor Faed: Had you been in charge of Mr. DeZon and had the direction as to what should have been done to him, under all the facts and circumstances developed in this case, would it have been your instruction to hospitalize him at the time this trouble to the eye developed on June 4th?

Mr. Treadwell. The same objection to that, it is the same question.

The Court. If he wants to change his answer, I presume——

A. I think I would have advised it, from what I know of the records.

Q. In other words, not being sure whether you should or should not, you would have given the advantage to the patient?

A. That is right."

Dr. Jerome Bettman, an eye specialist, testified as follows (R. p. 141):

"Q. Now what is the probability of recovery from a hemorrhage such as described in this case?

A. The prospect of recovering even passable good vision is very poor, and the prospect of loss of the eye is rather good.

Q. Well, the word—my associate thought the word should be—maybe you could make it a little more definite.

A. Well, should we say that there is only a slight chance of recovering good vision? In fact, it is rather——

The Court. Q. It is a remote possibility?
A. That is right, *it is a remote possibility.*"

In regard to the hospitalization he testified in response to questions by plaintiff's counsel as follows (R. p. 150):

"Q. And with respect to whether or not under the facts and circumstances as revealed in this case Dr. Faed testified that DeZon should have been hospitalized when this trouble first arose, would you agree or disagree with that?

A. As the question is stated, I would agree with it. *However, in view of the fact he was under the care of a general man, I believe that it is—in fact, I know it is a little too much to expect of the average general man to be certain that this case is or is not serious, or to be certain of the diagnosis within a relatively short time.*

Q. Granting that what you say is true, if a hospital, fully equipped hospital, with eye specialists in attendance, was available, and this condition arose, would you, as a specialist, have referred him to the hospital or kept him on with a general practitioner?

A. Well, I, as a specialist, would have referred him to the hospital, of course."

Dr. Faed's testimony that he was "unable to give any opinion" and that he didn't "wish to go on record" as to the possible effect of different treatment or hospitalization, can serve no purpose except to show that it is impossible for even an expert to say that plaintiff might have been any better off in the event he had been accorded different treatment or hospitalization. The testimony of Dr. Bettman, the eye spe-

cialist, that regardless of the treatment or hospitalization, the chance of plaintiff recovering was a "remote possibility" falls far short of the required affirmative proof through experts that the shipowner was responsible for plaintiff's failure to recover from his eye disease. Facts must be established, at least with reasonable certainty, and here a "remote possibility" cannot be said to establish any fact. Any finding that plaintiff might have had different results if given different medical treatment and hospitalization would, at most, be a mere conjecture standing upon the basis of uncertain inference, and clearly insufficient to discharge plaintiff's burden of affirmative proof through experts.

In *Copeland v. Hines,* 269 Fed. 361, 363, the court said:

> "A mere conjecture, standing upon a basis of uncertain inference, does not make substantial evidence. Such a case lacks both the quantitative and the qualitative essential minimum."

See to same effect:

> *Baltimore & O. R. R. Co. v. Kast,* 299 Fed. 419, 422.

In *The Harry Buschman,* 33 Fed. 558, 560, the court in denying a seaman damages for alleged improper treatment aboard ship, said:

> "And even now, considering the length of time that had then elapsed since the accident, the special skill necessary in the treatment of such a case, and the fact more than half the cases of 'Collis fractures', when treated at once, instead of after a

lapse of 40 days, do not result in perfect cures, it is doubtful whether the final result would have been better had he been left at one of the Spanish hospitals. The medical experts say that even had the wrist been treated in the best manner at once on arrival at Pasages, that is, 40 days after the fracture, it is not probable that it would have been sufficiently restored for the libelant to continue an able seaman. * * * In every aspect of the case, there remains too much of doubt, and a failure of the necessary preponderating proof on the libelant's part to authorize me to charge the ship with fault."

In *Geistlinger v. International Mercantile Marine*, 295 Fed. 176, the court, in denying a seaman's claim for damages against a steamship company because of the ship doctor's failure or refusal to send the seaman to a hospital at Southampton while the ship was at that port, pointed out that:

"there is no evidence that if he had been left at Southampton the treatment there would have been different from what he received on board, or that a better result would have ensued."

In *Moore v. Tremelling*, C.C.A 9th, 78 F. (2d) 821, the court said:

"Moreover, even if we assume that both the initial treatment and the subsequent care of the plaintiff were negligent, there is a fatal defect in the proof because it is not shown that proper treatment would have produced a better result. * * * It cannot be assumed that, in the absence of malpractice the result would have been better, it

must be shown by the evidence of expert witnesses.

* * * * * * *

"The motion for a directed verdict should have been granted."

In *Ewing v. Goode*, 78 F. 442, Judge Taft, then Circuit Judge, in directing a verdict for defendant, stated:

"Again, when the burden of proof is on the plaintiff to show that the injury was negligently caused by defendant, it is not enough to show the injury, together with the expert opinion that it might have occurred from negligence and many other causes. Such evidence has no tendency to show that negligence *did* cause the injury. When plaintiff produces evidence that is consistent with a hypothesis that the defendant is not negligent, and also one that he is, his proof tends to establish neither."

See also:

Barker v. Heany, 82 S. W. (2d) 417;
Kramer Service, Inc. v. Wilkins, 186 So. 625;
American Nat. Ins. Co. v. Smith, 47 S. W. (2d) 1078;
Henley v. Mason, 153 S. E. 653;
Clayton v. English, 57 App. D. C. 324;
Wright v. Conway, 241 Pac. 369, 242 Pac. 1107.

V.

THERE IS NO BASIS WHATEVER FOR THE CONTENTION THAT THERE WAS ANY SUBSTANTIAL EVIDENCE THAT WOULD SHOW NEGLIGENCE BY SHIP'S OFFICERS OTHER THAN THE SHIP SURGEON.

1. In this particular the petitioner first claims that there was negligence in failure to have the ship's doctor on board while the ship was at Honolulu between 6:00 P.M. and 11:30 P.M. We think the court will take judicial notice of the custom to take shore leave when the ship is in port, and no evidence whatever was introduced that the doctor was violating any rule in being absent from the ship while it was in port. In fact, a seaman has no right to require that a physician be on board the vessel, either in port or out of port.

The Wensleydale, 41 Fed. 602;
Geistlinger v. International Mercantile Marine, 295 Fed. 176.

In the absence of the physician the seaman could have gone to any other officer and asked to be given treatment or to be sent ashore. Moreover, there is no evidence that indicates that the doctor would have made any different diagnosis or reached any different conclusion as to hospitalization if he had examined the petitioner immediately upon his return to the ship rather than when he examined him a few hours later.

2. Petitioner also tries to suggest some negligence on the part of the second engineer. His testimony was that when his eye first began to hurt "I just notified the man in the fire room I was going topside" (R. p. 14, lines 26-27). He then testified that he went to his room and washed out his eye and then testified

"I notified the Second, that is, Mr. Bangs, that I had something the matter with my eye" (R. p. 15, lines 7-9). He did not know whether this was in the morning that he was hurt or that night (R. p. 78, lines 16-29). It is perfectly clear that he did not consider there was anything seriously wrong with his eye because he continued to work and did not ask to be relieved and did not go to the doctor whom he knew was on board and available, and it would be unreasonable to conclude that he conveyed to the second engineer that there was anything seriously wrong with his eye which required medical attention. It was not until the next morning that he himself concluded to go to the doctor. Obviously, since the ship was at sea at that time, if the second engineer had been made to know that there was anything wrong with the petitioner's eye, all he could have done would have been to send him to the ship's surgeon. He certainly could not at that time have sent him to a shore hospital. This contention obviously does not rise to the dignity of substantial evidence of neglect.

3. The next matter mentioned in the petition is that the doctor failed to notify the master of the plaintiff's infirmity. On the contrary, the evidence shows that the doctor prepared daily health reports that showed the diagnosis of petitioner's trouble and these were daily delivered to the master (R. p. 97, lines 10-17). Acute conjunctivitis, according to all the evidence, is considered a trivial affliction which in a few days responds to a simple and well-known treatment. There was no occasion, therefore, for the physician to specially consult the master (R. pp. 103, 104).

VI.

CASES RELIED UPON BY PETITIONER.

A complete review of the cases cited by petitioner is hardly necessary. In *Jacob v. City of New York*, ... U. S. ....., 86 L. ed. (Adv.) 750, the court found that a substantial question of fact was presented, and that therefore the case should go to the jury.

In *Cortez v. Baltimore Insular Line*, 287 U. S. 367, 77 L. ed. 368, the court neither held that there was negligence nor that such was the cause of death, but merely held that negligent care causing death gave the personal representative an action under the Jones Act, the lower court having erroneously held to the contrary.

The case of *The Korea Maru*, 254 Fed. 397, involved a case where no attention whatever was given to the seaman and this was participated in by the ship's officers as well as the doctor, while the case at bar is a case of alleged faulty diagnosis by the doctor alone.

In *Anelich v. "Arizona"* (Wash.), 1935 AMC 1332 the neglect was due entirely to the fault of the officers of the ship. The same is true of *Persson v. Gulf Refining Co.*, 239 N. Y. S. 796.

In *Unica v. United States*, 1923 AMC 455, the fault was the fault of the master.

In *Nahmeh v. United States*, 1926 AMC 1150, the chief engineer thought the seaman was a malingerer and so reported to the master with the result that the master paid no attention to the seaman.

In *Leone v. Booth S.S. Co.*, 232 N. Y. 183, 133 N. E. 439, the master himself was responsible as he acted in direct opposition to the advice of the ship surgeon. However, in that case it was held:

> "a steamship owner is not liable for negligence of a competent ship's surgeon and the Master may rely on his advice received in good faith, and, so acting, no liability can be predicated on error or mistake."

The above cases were relied upon by petitioner in his appeal to the Circuit Court of Appeals. They are reviewed at some length and clearly shown to be inapplicable and not in point in the opinion of that court.

VII.

SOME POINTS STRESSED BY PETITIONER.

1. On page 10 of petitioner's brief he denies the statement that petitioner told the ship doctor that he preferred to go to San Francisco. This is strictly in accordance with the record (R. pp. 83, 84).

2. Petitioner stresses the fact that the seaman testified that he told the doctor that unless he was hospitalized he stood a good chance to lose the sight of his right eye. Assuming that this report was given the doctor, the doctor was not required to put any credence in it in view of the fact that he had diagnosed the case as acute conjunctivitis and the Honolulu doctor had done the same, and the testimony is undisputed that acute conjunctivities is not a serious condition (R. pp. 55, 104, 110).

3. The statement on page 19 that, the doctor being absent when petitioner returned to the vessel at Honolulu, the failure to give petitioner any treatment constituted negligence. According to his own testimony, he had been given treatment by the ship doctor before the ship arrived at Honolulu; the doctor gave him a master's certificate to enable him to obtain medical and hospital treatment at Honolulu, and he voluntarily returned to the ship and asked nothing of any officer of the ship, but was put to bed by the orderly, and as soon as the doctor returned the doctor examined him and decided that he was able to take care of him. There is no evidence whatever that anything happened to him due to the absence of the doctor from the time the petitioner returned at 6:00 P.M. and the time that the doctor returned at 11:20 P.M. If on his return he had asked the master for permission to leave the ship and the master had refused it, there might be some basis for argument.

4. On page 26 petitioner refers again to the fact that at some time during the day he was injured he told the second engineer that he had something the matter with his eye, and he claims that it was negligence for the second engineer not to have told him to go to the doctor. However that may be, he did go to the doctor early the next morning and the doctor diagnosed the case as acute conjunctivitis and gave him the proper treatment therefor, and there is no evidence whatever that any different diagnosis would have been made by the doctor if he had been consulted the night before.

5. In several places in petitioner's brief reference is made to testimony of eye specialists based not on what was known at the time the ship's surgeon diagnosed the case at Honolulu, but after further facts had been developed at the Marine Hospital at San Francisco, and the diagnosis of intraocular hemorrhage was made. The testimony of specialists that in case of intraocular hemorrhage certain treatment might have been beneficial and that hospitalization was proper throws no light on the question of negligence of the ship's doctor, who, from the history given and the appearance of the eye, diagnosed the case as acute conjunctivitis, as did Dr. Yap at the Queen's Hospital in Honolulu.

CONCLUSION.

We respectfully submit that there was no substantial evidence of negligence of the ship's doctor or ship's officers, that all the evidence showed that the company had used reasonable care to select a competent physician, and that it was not liable for any error of judgment of such physician. Accordingly, the petition should be denied.

Dated, San Francisco, California,
October 26, 1942.

TREADWELL & LAUGHLIN,
EDWARD F. TREADWELL,
REGINALD S. LAUGHLIN,
Attorneys for Respondent.

p. 1 dissent

SUPREME COURT OF THE UNITED STATES.

No. 436.—October Term, 1942.

Joseph De Zon, Petitioner, vs. American President Lines, Ltd.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 5, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

Petitioner, a seaman, brought an action at law under the Jones Act[1] against the respondent shipowner. He alleged that while in the service of its ship he suffered injuries which resulted in the loss of his right eye because of the negligence of the ship's doctor in treating him and in failing to have him hospitalized ashore. The trial court directed a verdict against him. The Circuit Court of Appeals affirmed for the reason, among others, that the shipowner's duty to the seaman was only to use due care in selecting a competent physician and, that being done, was not responsible for his incompetence or negligence. 129 F. 2d 404. This holding raised an important question of federal law under the Jones Act not passed on heretofore by this Court. Accordingly we granted certiorari. — U. S. —.

The petitioner signed articles as a marine fireman for a voyage from San Francisco to the Orient and return on the respondent's passenger ship *President Taft*. The voyage was of about sixty days' duration, ending at the home port on June 10, 1940. On June 3, while petitioner was painting the outside of a boiler, a chip of dry aluminum paint lodged in his right eye, followed probably by getting some of the liquid paint in as well. He went to his quarters and washed the eye with a wash in an eye cup. At this time he did not believe that anything was seriously amiss with his eye, and he returned to work. When he arose the next morning he was suffering considerably from his eye. He told the ship's doctor of this history, and the doctor examined his eye without the aid of any special equipment, washed it out with a boric solution, irrigated it with argyrol, and bandaged it. He told peti-

[1] 41 Stat. 1007, 46 U. S. C. § 688.

tioner not to work, and the petitioner repaired to his quarters and stayed there until the ship came into Honolulu about 4:00 in the afternoon. Then the ship's doctor gave him authority from the master to go ashore for examination at the outpatient department of the Marine Hospital in Honolulu. Petitioner found this closed and went to Queens Hospital. There he was examined by Doctor Yap, a physician of unspecified qualifications, who diagnosed the injury as "acute traumatic conjunctivitis" [injury to outer coating of eye resulting from a blow], washed out the eye with a boric acid wash and applied yellow oxide and an eye pad. Doctor Yap told the petitioner that he could not do much for him, but advised petitioner to get off the ship and be hospitalized ashore. The petitioner returned to the ship, arriving at about 6:00 in the evening. The ship's doctor was ashore, and, since the petitioner did not feel well, the ship's medical orderly put him to bed. Forty minutes before sailing time the ship's doctor returned. He saw petitioner at 11:30 and was informed of Doctor Yap's recommendation, then told the petitioner that: "Well, if you want to take a chance or a gamble on it you can go on to the States. It don't look so bad. It can be all right." The petitioner answered: "You are the boss; if you want to go, let's go."

The ship sailed at 12:00 midnight on June 4 with petitioner hospitalized aboard. The petitioner's injured right eye got steadily worse, and, in the ship's doctor's term, was in an "alarming" condition two or three days later. The ship's doctor sought the advice of another doctor, a passenger, who had resided in the Orient and was familiar with eye infections common there. He thought that none of these was present, but suggested that petitioner be given sulfapyridine, a drug used to combat eye infections; and this advice was followed. On arrival at San Francisco on June 10, the petitioner was taken to the Marine Hospital by ambulance.

On the evening of June 11, a consulting eye specialist was called in. In the belief that there was a foreign body in the eye he recommended an X-ray, which was made on the next day. Thereafter he reported that the anterior chamber of the eye was filled with dark hemorrhage material, and that in that chamber there was "fibrin . . . or scar of previous operation, most likely the former," with the comment that "This is a peculiar looking eye which is difficult to fit in with the history of impact

with paint scale or possible steel fragment. The hemorrhage suggests perforation with injury to iris or ciliary body. There is small likelihood of a contusion causing it." Petitioner's injury was finally diagnosed on June 15 as "Hemorrhage, anterior chamber, right eye, traumatic." The eye was removed on July 5. In the course of aftertreatment there was entered in the hospital records, on September 10, the statement that: "At this time patient changes history of injury and also states he had a muscle operation on right eye in 1937. Injury now alleged to cause the disability was a scale of paint in the eye and it is the opinion of the surgeon in charge that this would give an intraocular hemorrhage such as was present in the right eye. Diagnosis changed September 10, 1940."

Doctor Faed, connected with the Marine Hospital in San Francisco, who had removed the eye, was called as petitioner's witness. He testified that whether an eye injury can be diagnosed as conjunctivitis, as the ship's doctor had diagnosed it, or as a hemorrhage, as was finally the diagnosis at the Marine Hospital, depends upon the doctor and the facilities at his command. He was asked on direct examination whether "if such treatment as was given in the Marine Hospital on June 10th and following had been afforded Mr. De Zon on June 3rd, 4th and following, . . . that might have saved his eye," and answered that "I am unable to give an opinion about that." Then, in response to a question whether, on the basis of the whole history of the case, including that developed at the Marine Hospital at San Francisco, it was his opinion that petitioner "should have been hospitalized on June 3rd and 4th, when this trouble to the eye first occurred," he answered that: "I believe he should have been hospitalized; it might have helped some." He did not wish, however, to "go on record" as saying that it would have aided, and testified further on direct examination that, not being sure whether to hospitalize petitioner at the earlier date, he "would have given the advantage to the patient." Another and apparently equally well qualified eye specialist, offered as respondent's witness, testified, as did the ship's doctor, that the ship's doctor had given the standard treatment for conjunctivitis, and that additional treatment such as was given the petitioner at San Francisco would have had no beneficial effect, and might have had harmful effects, if given before the period of time which elapsed on the voyage to San Francisco. This specialist also testified, and without contradic-

tion, that it was too much to expect of the ordinary general practitioner, such as the ship's doctor was, to be able to diagnose petitioner's case as a dangerous one.

The testimony of respondent is uncontradicted that the ship's doctor was a duly licensed physician in California, a general practitioner with some surgical experience, and was selected only after careful inquiry had satisfied the Chief Surgeon of the respondent that he was a competent man for the post. It is conceded that proper investigation was made, and it was learned that he was a man of good reputation and character.

Respondent's Chief Surgeon also testified that authority to decide whether a seaman should be treated, and the manner of treatment, was vested in the master, who had authority to disregard any recommendation in this regard that the ship's doctor might make. See also, R. S. § 4596, 46 U. S. C. § 701; R. S. § 4612, 46 U. S. C. § 713.

The Circuit Court of Appeals in considering this case held that the shipowner's duty ended with the exercise of reasonable care to secure a competent general practitioner and since there could be no question that such care had been exercised, the shipowner could not be held liable in damages for harm that could have followed the negligence of the ship's doctor. In our opinion this was error.

The Jones Act reads in pertinent part as follows: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . . ." Thus it makes applicable to seamen injured in the course of their employment the provisions of the Federal Employers' Liability Act, 45 U. S. C. §§ 51-60, which gives to railroad employees a right of recovery for injuries resulting from the negligence of their employer, its agents or employees. *Panama R. Co.* v. *Johnson*, 264 U. S. 375; *The Arizona* v. *Anelich*, 298 U. S. 110; *O'Donnell* v. *Great Lakes Dredge & Dock Co.* (No. 320, decided February 1, 1943).

Cortes v. *Baltimore Insular Line*, 287 U. S. 367, 377-378, explained the effect of the Jones Act as follows: "Congress did not mean that the standards of legal duty must be the same by land and sea. Congress meant no more than this, that the duty

must be legal, i. e., imposed by law; that it shall have been imposed for the benefit of the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail." Recovery was accordingly allowed under the Jones Act for the negligence of the master in the discharge of the ancient duty to provide maintenance and cure for a seaman wounded in the service of the ship.

We are of opinion that the reasoning of the *Cortes* case is controlling, and that there is nothing in this case to shield the shipowner from liability for any negligence of the ship's doctor.

Immunity cannot be rested upon the ground that the medical service was the seaman's and the doctor's business and the treatment not in pursuance of the doctor's duty to the ship or the ship's duty to the seaman.[2]

"The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations."

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[2] Liability to a passenger injured by the negligence of a ship's doctor has been denied on this ground. One of the leading cases on liability to passengers is Laubheim v. DeK. N. S. Co., 107 N. Y. 228. It arose before, but was decided after, the enactment of the Act of Congress of August 2, 1882, 22 Stat. 186, 188, 46 U. S. C. § 155, imposing upon ships carrying certain types of passengers the obligation of providing a "competent" doctor for the benefit of the passengers. The plaintiff, a passenger, sued the shipowner for personal injuries resulting from alleged negligence of the ship's surgeon. Judge Francis M. Finch disposed of the case in a short opinion, in the apparent belief that the rule applied was not sufficiently in question to warrant discussion. He said: "If, by law or by choice, the defendant was bound to provide a surgeon for its ships, its duty to the passengers was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty. (*Chapman* v. *Erie R. Co.*, 55 N. Y. 579; *McDonald* v. *Hospital*, 120 Mass. 432; *Secord* v. *St. Paul R. R. Co.*, 18 Fed. Rep. 221.) It is responsible solely for its own negligence and not for that of the surgeon employed." The Chapman case tested liability of a railroad by the "fellow servant" doctrine, which has been abolished by the Federal Employers' Liability Act and can therefore have no application in this case. Jamison v. Encarnacion, 281 U. S. 635. The Secord case gives only a charge to a jury in a case where the issue was liability of a railroad to a passenger for negligent treatment by a physician in its employ. The McDonald case held a hospital immune from liability for negligence of its house surgeon on the ground that it was a charitable institution.

O'Brien v. Cunard Steamship Co., 154 Mass. 272, arose under the Act of August 2, 1882, and was decided after the Laubheim case, upon which it relied. Judge Knowlton of the Massachusetts Supreme Judicial Court said: "Under this statute it is the duty of ship-owners to provide a competent surgeon, whom the passengers may employ if they choose, in the business of healing their wounds and curing their diseases. The law does not put the business of treat-

The Iroquois, 194 U. S. 240, 241-242. When the seaman becomes committed to the service of the ship the maritime law annexes a duty that no private agreement is competent to abrogate, and the ship is committed to the maintenance and cure of the seaman for illness or injury during the period of the voyage, and in some cases for a period thereafter.[3] This duty does not depend upon fault. It is no merely formal obligation and it admits of no merely perfunctory discharge. Its measure depends upon the circumstances of each case—the seriousness of the injury or illness and the availability of aid. Although there may be no duty to the seaman to carry a physician, the circumstances may be such as to require reasonable measures to get him to one, as by turning back, putting in to the nearest port although not one of call, hailing a passing ship, or taking other measures of considerable cost in time and money. Failure to furnish such care, even at the cost of a week's delay, has been held by this Court to be a basis for damages. *The Iroquois, supra.*

To provide a ship's physician was therefore no mere act of charity.[4] The doctor in treating the seaman was engaged in the shipowner's business; it was the ship's duty that he was discharging in treating the injured eye. While, no doubt, the physi-

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ing sick passengers into the charge of common carriers, and make them responsible for the proper management of it. The work which the physician or surgeon does in such cases is under the control of the passengers themselves. It is their business, not the business of the carriers . . . The master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger. He is not their servant, engaged in their business and subject to their control as to his mode of treatment. They do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner, and supply him with all necessary and proper instruments, medicines, and medical comforts, and have him in readiness for such passengers as choose to employ him. This is the whole requirement of the statute of the United States applicable to such cases. . . . .'' *Id.* at 275-276.

These statements of judges of great learning, for courts of last resort of states having much to do with maritime pursuits, had their influence upon the federal courts dealing with the same problem. The Great Northern, 251 F. 826; The Korea Maru, 254 F. 397, 399; Branch v. Compagnie Generale Transatlantique, 11 F. Supp. 832; cf. The Napolitan Prince, 134 F. 159.

[3] The duty is not to ''cure'' in a literal sense, but to provide care, including nursing and medical attention. Calmar S. S. Corp. v. Taylor, 303 U. S. 525, 528. It has not been restricted by the Shipowners' Liability Convention of 1936, 54 Stat. 1693, which provides in Article 12 that ''Nothing in this Convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions than those provided by this Convention.''

[4] We express no opinion upon whether charitable or gratuitous nature of medical attention should have exculpatory effect. Cf. President and Directors of Georgetown College v. Hughes, 130 F. 2d 810.

cian recognized at least an ethical obligation between himself and the patient, he was performing the service because the ship employed him to do so, not because the petitioner did. He was not an independent practitioner, called to treat one whose expenses the ship agreed to make good. We express no view as to the liability for malpractice by one not in the employ of the ship.[5] But in this case the physician was not in his own or the seaman's control; he was an employee and as such subject to the ship discipline and the master's orders.

Whatever, in the absence of the Jones Act, might have been the effect upon respondent's liability of the fact that petitioner and the ship doctor were both in its employ, that Act prevents this fact from conferring an immunity upon the respondent. *Jamison* v. *Encarnacion*, 281 U. S. 635; *Cortes* v. *Baltimore Insular Line*, *supra*.

We hold, therefore, that the shipowner was liable in damages for harm suffered as the result of any negligence on the part of the ship's doctor.[6]

We come, then, to the question as to whether there was sufficient proof of negligence to require sending this case to the jury.

The short of the case is that the petitioner failed to disclose the past history of the eye to the ship's doctor, and the ship's doctor diagnosed the case as one of conjunctivitis and gave the petitioner what undisputed medical testimony says to be the standard treatment for that condition. Going ashore, the case was diagnosed similarly by a physician of unstated qualifications, who treated the eye in the same manner as the ship's doctor. Returning to the ship, the petitioner told the ship's doctor of the shore doctor's recommendation that he leave the ship and be hospitalized ashore. The ship's doctor acknowledges that he would have heeded such a recommendation had it been made, but asserts that it was not made.

[5] Cf. The Sarnia, 147 F. 106; The C. S. Holmes, 299 F. 970; Bonam v. Southern Menhaden Corp., 284 F. 360 (involving physicians other than ship's doctors).

[6] Johnson v. Anderson Mail Line, 1937 A. M. C. 1267 (Superior Court for King County, Washington), reached the opposite conclusion, relying upon cases cited in footnotes 2 and 5, *supra*, which we think are inapposite for the reasons already stated. Geistlinger v. International Mercantile Marine Co., 295 F. 176, also denied liability for the ship's doctor's negligent treatment of a seaman, but it did not find the Jones Act applicable, and did not consider what its effect might be if it should be found applicable. Leone v. Booth S. S. Co., 232 N. Y. 183, also denied liability, but it was decided on facts antedating the Jones Act, and it too did not consider the effect of the Act.

For purposes of testing the correctness of the direction of the verdict, we must assume that the ship's doctor was told of it. The concession of the ship's doctor that he would have heeded such a recommendation is not of itself evidence of negligence. There is not a word of evidence that the shore doctor was any better qualified to diagnose the eye than was the ship's doctor, and as a matter of fact his diagnosis of the case was the same as the ship's doctor's. That their prognoses were different does not establish either that the one was overly cautious or that the other was negligent in failing to take the same attitude as to the necessity of hospitalization ashore. Our own experience vividly demonstrates that careful and competent men frequently reach different conclusions despite the fullest and most careful examination of all available data, including the difference of opinion on the part of their associates. In the present case neither doctor had the benefit of all the facts of the eye's history. The character of the petitioner's affliction was not ascertained until days after the petitioner reached San Francisco, and then only after an outside consultant was called in to advise the eye specialists in the Marine Hospital. True it is that one doctor said, partly on the basis of the facts disclosed long after petitioner's eye had been removed, that he would have recommended hospitalization at Honolulu, and that additional treatment at the time petitioner was en route to San Francisco might have had a beneficial effect; but even on the basis of the knowledge available at the trial he would not venture an opinion that treatment such as was given at San Francisco would have saved petitioner's eye if given before or at the time he reached Honolulu. Another, and apparently equally well qualified eye specialist testified that nothing in addition to the standard course of treatment for conjunctivitis, which the ship's doctor gave, could have been done with safety until after the petitioner's arrival in San Francisco, and that any attempt to do more probably would have actually impaired petitioner's chances of saving his eye. He testified, and without contradiction, that it was too much to expect of the ordinary general practitioner, such as the ship's doctor was, to be able to diagnose petitioner's case as a dangerous one.

In these circumstances it is said that the ship's doctor should have sent the petitioner ashore, despite the petitioner's desire to return to San Francisco with the boat; and although there is no evidence what the facilities were at Honolulu. Had he put peti-

tioner ashore only to have him lose his eye, it is conceivable that he would have been charged with neglect in doing that.

If there was malpractice in this case, no evidence of it has been put into this record. The surgeon who removed the eye was called as a witness. He testified that the cause of the trouble was a hemorrhage. But no professional opinion was offered as to when the hemorrhage took place. We do not know whether the ship's surgeon is accused of malpractice for failure to cure a hemorrhage which had already occurred when he was first consulted or because of failure to anticipate it and prevent it. Moreover, there is no proof whatever that, if a hemorrhage within the eye once occurred to an extent not absorbed by the ordinary natural processes, it is curable at all. If this petitioner was destined to lose his eye at all odds, he hardly establishes a cause of action by saying it should have occurred at Honolulu instead of San Francisco. Hospitalization either on ship or on land is not in itself a cure. At San Francisco, specialists had no cure for the eye but to remove it, and we are not told that anything different could have been done at any earlier stage with any probability that it would bring about a different result.

The doctor apparently made a wrong diagnosis, but that does not prove that it was a negligent one. It seemed to be the obvious diagnosis from the history which the patient gave him, and that appears to have been incomplete and not unlikely to mislead.

The loss of the petitioner's eye is a serious handicap. But damages may be recovered under the Jones Act only for negligence. *Jamison* v. *Encarnacion, supra,* at 639. Whether the legislative policy of compensating only on the basis of proven fault is wise is not for us to say, nor is it our function to circumvent it by reading into the law a theory, however disguised, that a physician who undertakes care guarantees cure, and that each unsuccessful effort of the physician may be visited with a successful malpractice suit.

Affirmed.

Mr. Justice RUTLEDGE did not participate in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 436.—October Term, 1942.

Joseph De Zon, Petitioner, vs. American President Lines, Ltd. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 5, 1943.]

Mr. Justice Black, dissenting.

The issue in this case is: shall a jury or a court decide whether petitioner lost his eye through the respondent's negligence? I agree with the Court that the shipowner was liable for the negligence of its doctor, and I agree further that the Jones Act is not a workmen's compensation act and does not impose liability without fault; but I do not agree that a court may substitute its judgment on the facts for the decision of a jury when, as here, there is room for reasonable difference of opinion on the critical issue of the case. I think there was sufficient evidence to permit a jury to find negligence in the doctor's failure to leave the petitioner at Honolulu for hospital treatment.

The evidence showed that this seaman sustained an injury so serious that it resulted in the eventual removal of his eye. When a seaman is injured, the shipowner has an imperative obligation to come to his aid;[1] and the shipowner's responsibility is so heavy that he may be found negligent for failure to take his ship to the nearest port in order to provide adequate treatment.[2] There is a similar obligation to leave a seriously injured seaman in a port at which a vessel has arrived.[3] This duty of course exists where no adequate treatment can be given on the ship. Here the ship's doctor was not an eye specialist; the ship did not have aboard the medicines which competent physicians in San Francisco applied; and there was no x-ray although one was later found essential for

[1] Hardin v. Gordon, 2 Mason 541; Reed v. Canfield, 1 Sumner 195.

[2] The Iroquois, 194 U. S. 240, 242.

[3] The United States guarantees the cost of maintenance and return to the United States of injured seamen discharged in foreign ports. 46 U. S. C. § 683.

diagnosing the ailment. It is not surprising that the ship should lack these facilities, for every merchant vessel cannot be a floating hospital; but it is for this very reason that a ship is required to furnish shore treatment for seriously injured seamen.

The United States Marine Hospital in Honolulu had all the facilities which the ship lacked. These hospitals are recognized government institutions and a seaman has no burden to prove that the equipment and treatment in the hospital would have been better than the equipment and treatment on the ship. Here as in *Leone v. Booth Steamship Co.*, 232 N. Y. 183, 185, "It is to prefer shadow to substance to make the result of this action depend on affirmative proof of this matter."

What was the evidence on which the jury could have found that the seaman should have been left for treatment in this hospital? The petitioner's eye began to pain him as a result of an accident on June 3, 1940. By 7 o'clock the next morning, the eye was in such condition that he required medical treatment from the ship's doctor and was released from duty. At 5 o'clock that afternoon the vessel docked at Honolulu. The ship's doctor sent him to the Marine Hospital, which was closed at that hour, and he went to Queens Hospital which, according to the evidence, is an emergency institution connected with the Marine Hospital and which takes care of patients temporarily. The doctor at Queens Hospital advised the petitioner that he should be released from his vessel and enter the hospital at once. This physician advised the seaman that he might lose his eye if he returned to the ship.

The petitioner returned to his vessel at 6 P. M. but was unable to see the ship's doctor until 11:30, approximately 30 minutes before the vessel sailed. He repeated to the ship's doctor the advice given him ashore. The seaman testified that the doctor told him that no danger would result from returning to San Francisco, and, since the doctor was his superior officer and an "accredited physician", he relied upon the doctor's advice although he was suffering intensely.

The petitioner's eye grew worse, treatment in the San Francisco Hospital failed to cure it, and it was removed. Two San Francisco specialists familiar with his case testified that they would have advised that he be left in Honolulu for hospital treatment. True, we have no testimony that the eye would have been saved by hospitalization at Honolulu, and whether it could have been

will never be known; but it is clear that the petitioner would have received excellent treatment at an earlier date than he did. Adequate treatment, of course, is usually aimed at curing or alleviating the serious consequences of injuries and diseases, and timely treatment can prevent progressive physical deterioration. Someone must decide whether such happy results would have followed earlier hospitalization in the instant case.

Directing a verdict against the petitioner in this case is substituting judicial for jury judgment on factual questions which can as readily be decided by the layman as by the lawyer. When we consider the weight of the evidence and resolve doubtful questions such as these, we invade the historic jury function. "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment." *Jacob* v. *New York City*, 315 U. S. 752. This constitutional command should not be circumvented.

Mr. Justice DOUGLAS and Mr. Justice MURPHY join in this dissent.